DAVID W. HENLEY

IBLA 71-16 Decided September 13, 1972

Appeal from decision (A-054784) of Alaska state office, Bureau of Land Management, rejecting in part trade and manufacturing site application to purchase.

Reversed and remanded.

Alaska: Shore Space Reserves and Restrictions -- Alaska: Trade and Manufacturing Sites

An application to purchase a trade and manufacturing site may not be rejected on the basis that it extends more than 80 rods (1320 feet) along the shore of any navigable water where the site consists of two lots, one behind the other, each one of which extends 1073.82 feet (16.27 chains) along separate and discrete bodies of water, leaving at least 80 rods of shoreline between the termini of the entry.

APPEARANCES: David W. Henley, pro se.

OPINION BY MR. FISHMAN

David W. Henley has appealed from a decision, dated July 23, 1970, rejecting his application to purchase a trade and manufacturing site as to lot 2, U.S. Survey No. 4935, Alaska, on the basis that the entry extends more than 80 rods (1320 feet) along the shore of a navigable body of water. 43 U.S.C. 687a-2 (1970).

The entry consists of lot 1, containing 7 acres, and lot 2, containing 6.66 acres. Lot 1 adjoins the Tidewater Lagoon and lot 2 adjoins Isthmus Bay. Lot 2 adjoins lot 1 to the east.

The Alaska state office relied on 43 CFR 2094.1(a) (1972), which reads as follows:

> In the consideration of applications to enter lands shown upon plats of public surveys in Alaska, as abutting upon navigable waters, the restriction

> as to length of claims shall be determined as follows: The length of the water front of a subdivision will be considered as represented by the longest straight-line distance between the shore corners of the tract, measured along lines parallel to the boundaries of the subdivision; and the sum of the distances of each subdivision of the application abutting on the water, so determined, shall be considered as to the total shore length of the application. Where, so measured, the excess of shore length is greater than the deficiency would be if an end tract or tracts were eliminated, such tract or tracts shall be excluded, otherwise the application may be allowed if in other respects proper.

That office found the length of the water front of subdivision lot 1 to be 16.27 chains, or approximately 1073 feet. It also found the water front of lot 2 to be 16.27 chains or approximately 1073 feet. It concluded that it was obliged to add the length of the water fronts, thus reaching an aggregate of 32.54 chains or 2,147.61 feet, in excess of the 1320 feet frontage allowed by law.

It is not clear from the record what the basis of the addition was. The regulation prescribes as the proper measure "* * * the sum of the distances of each subdivision of the application abutting on the water. * * *"

Obviously, lot 2 does not abut on the Tidewater Lagoon. Therefore, in determining whether the entry violates the 80-rod restriction as to the Tidewater Lagoon, lot 2 is not cognizable. This brings to the fore whether an entry which borders bodies of water on each of two sides, i.e., on a narrow peninsula of land, for 1073 feet on each side is allowable. The land in issue lies across the neck of the peninsula which extends a substantial distance above this tract along the water. Our review of the record impels us to the conclusion that the granting of the entry would leave at least 80 rods of shoreline between the termini of the entry.

We hold that the statutory provision that "No entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods . . ." [43 U.S.C. § 687a-2 (1970)] was designed to prevent a greater acquisition along one shore line. Our view is buttressed by Richard W. Freer, A-26746 (August 19, 1953), which discusses the legislative history of shore space restrictions as follows:

The evident intention of Congress was to prevent private monopolies of Alaskan harbors and water courses. When the bill that became the act of May 14, 1898, was reported to the Senate by the Committee on Public Lands, it contained no restrictions on entries along shore lines. Senator Stewart of Nevada then offered an amendment to section 1 forbidding all entries within 1,000 feet of navigable water (31 Cong. Rec. 2276), arguing as follows in favor of his proposal: "* * * if locations are to be made on soldiers' scrip and everything of that kind, every bay, every harbor, and every place where a landing may be desirable will be owned by somebody in less than three months." Id. 2277. Later in the debate, the proposed amendment not yet having come to a vote, the floor manager of the bill, Senator Carter of Montana, declared, "I will state on the authority of the Senator from Nevada that that amendment may be considered withdrawn in view of the amendment about to be offered in behalf of the Committee." Id. p. 2414. He then offered a substitute amendment in the following language:

> "Provided, That no entry shall be allowed extending more than 40 rods along the shore of any navigable water, and along such shore a space of at least 40 rods shall be reserved from entry between all such claims."

The substitute amendment was adopted by the Senate. "80 rods" was substituted for "40 rods" by the Conference Committee.

Section 10 was also added on the floor of the Senate as a committee-sponsored amendment (Id. 2466).

When the bill was reported to the House by the Conference Committee in the form in which it was finally adopted, Rep. Lacey, one of the managers, explained the shore space provisions as follows:

> "The question was raised whether or not under this new law they might not get too large a shore right on the water front or get too large a fishery right, and in order to prevent anything of that kind, the bill reserved alternate 80-rod fronts on the water. So, a home !

> stead of 80 acres can be taken 80 rods on the shore, fronting on the water, but the next 80 acres must be reserved for the Government. This will absolutely prevent any possibility of the shores being monopolized." 31 Cong. Rec. 4597.

In Instructions, 29 L.D. 95, 96 (1899), the terms concerning the extent of the water front of claims under the Act of May 14, 1898, 30 Stat. 413 (which are currently found in 43 U.S.C. § 687a-2 (1970)) are discussed as follows:

> The several expressions, viz: "along the shore of any navigable water," "abutting on navigable water," "abutting on any navigable stream, inlet, gulf, bay or seashore," and "along the water front," are manifestly intended to mean one and the same thing, and to describe one of the boundaries of claims which abut on navigable water.

To conclude, the eighty-rod limitation involves consideration of the distance along "one of the boundaries of claims which abut on navigable water." Instructions, supra. [Emphasis supplied].

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is reversed and the case remanded for appropriate action consistent with this decision.

Frederick Fishman
Member

We concur:

Newton Frishberg
Chairman

Joan B. Thompson
Member